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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1992

KAREN LIVIDAS,
Petitioner,

VS.

LLOYD W. AUBRY, JR.,
IN HIS OFFICIAL CAPACITY AS
LABOR COMMISSIONER
FOR THE STATE OF CALIFORNIA,
Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state agency refuse to ad udicate claims filed by workers employed under the terms of collective bargaining agreements containing arbitration clauses when state law prohibits the agency from entertaining any claims involving any dispute regarding the interpretation or application of any collective bargaining agreement containing an arbitration clause

LIST OF PARTIES

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I.

STATEMENT OF THE CASE

A. *Background*

The California State Labor Commissioner, chief of the Division of Labor Standards Enforcement, is the state officer authorized to enforce all of the provisions of the California Labor Code the enforcement of which are not specifically

vested in any other officer[1]. As a part of this enforcement scheme, the Labor Commissioner may provide for a hearing to adjudicate claims of workers for recovery of wages, penalties and other demands for compensation properly before the Labor Commissioner[2].

Among the protections afforded California workers is the requirement, imposed upon employers by the provisions of Labor Code §201, that employees[3] discharged from their employment must be paid at the time of discharge. Labor Code §201 provides, *inter alia*:

> "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." (Emphasis added)

Willful violations of Labor Code §201 subject an employer to penalties pursuant to Labor Code §203. Labor Code §203 provides:

> "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, and 202, any wages of an employee who is discharged or who quits, the wages of such employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than 30 days. No employee who secretes or absents himself to avoid payment to him, or who refuses to receive payment when fully tendered to him, including any penalty then accrued

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[1]California Labor Code §95(a)

[2]Labor Code §98(a)

[3]Employees in certain seasonal employments (§201), and those employed in the motion picture industry (§201.5), oil well drilling industry (§201.7), and agriculture industry (§205.5) are not required to be paid immediately upon discharge.

> under this section, shall be entitled to any benefit under this section for the time during which he so avoids payment.
>
> "Suit may be filed for such penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise." (Emphasis added)

The jurisdiction of the California State Labor Commissioner to determine any controversies involving wages, penalties or other demands for compensation is limited, however. California Labor Code §229 provides:

> "Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement."

In 1975, the California State Court of Appeal, First Appellate District, permanently enjoined the Labor Commissioner from accepting or adjudicating wage claims where the *interpretation* or *application* of any collective bargaining agreement which contains an arbitration agreement is required. *Plumbing, Heating and Piping Council of Northern California v. Howard* (1975) 53 Cal.App.3d 828, 835.

In response to this injunction, the Labor Commissioner developed a policy which precludes agency personnel from processing claims involving any dispute which would require the agency to interpret or apply the provisions of a collective bargaining agreement containing an arbitration clause. The policy only applies to situations where there exists a CBA which contains an arbitration clause. The policy does not preclude acceptance or processing of claims filed on behalf of

workers who are employed under the terms of collective bargaining agreements which do not have arbitration clauses[4].

Further, the policy does not preclude workers employed under the terms of a CBA containing an arbitration clause from filing claims for the recovery of wages, penalties or demands the recovery of which would not require the application or interpretation of the terms of the collective bargaining agreement[5].

In addition, inasmuch as the enforcement of California's minimum labor standards[6] is not predicated upon the application or interpretation of the terms of a collective bargaining agreement, the presence or absence of such an agreement, or the inclusion of an arbitration clause in such a collective bargaining agreement, would have no effect on the enforcement of those minimum labor standards. Minimum labor standards such as minimum wage and overtime, unlike the enforcement of the penalty statute at issue here, depend entirely on criteria contained in the charging statute.

The Labor Commissioner's policy in regard to processing of any disputes involving the application or interpretation of

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[4]The statement at fn. 1 of the Petition to the effect that virtually all union contracts provide for grievance arbitration is not entirely accurate. There are many (particularly so-called "short form" contracts in the construction industry) which do not provide for either grievance procedures or arbitration. There have been a number of CBAs in California over the years which, while providing arbitration of some issues, specifically reserve to the California Labor Commissioner the right to hear and adjudicate claims involving Labor Code statutes.

[5]Recovery of wages represented by a non-sufficient funds check; recovery of employees' work tools, or recovery of damages for the loss of employees' work tools under the control of the employer are examples of actions which would not be precluded by the policy.

[6]The Labor Commissioner has repeatedly brought actions on behalf of workers employed under the terms of collective bargaining agreements to recover state mandated minimum wages or to enforce the provisions of the state law banning discrimination or retaliation in the terms and conditions of employment.

the terms of a collective bargaining agreement is grounded on the firm policy of the State of California as announced in the case of *Plumbing, Heating and Piping Council of Northern California v. Howard, supra*:

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the *application or interpretation* of an existing collective bargaining agreement." *Plumbing, Heating, Etc. v. Howard, supra*, 53 Cal.App. 3d 828 at 835, citing 29 U.S.C. §173(d). (Emphasis in original)

California's public policy in this regard is a mirror reflection of the principle announced by this Honorable Court in *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962), applied in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985) and reiterated in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988):

> "If the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are states) is pre-empted and federal labor-law principles—necessarily uniform throughout the Nation—must be employed to resolve the dispute." *Lingle v. Norge, supra*, 486 U.S. at 405-406.

It is this long-standing policy of the California Labor Commissioner which is attacked here. The correct question before this Honorable Court, accurately put, is not whether a state agency may refuse to enforce state wage and hour law for union workers because they exercise their federally-protected right to bargain collectively. The question addressed by the Ninth Circuit Court of Appeals was whether a state

agency, based upon the dictates of a state law, may decline to adjudicate a claim which, in the opinion of the state agency, requires, under the dictates of state law, the application and/or interpretation of a collective bargaining agreement which contains an arbitration agreement.

B. *Facts*

In January, 1990, Karen Livadas, a grocery clerk employed by Safeway Stores was terminated by her employer. Ms. Livadas had been employed under the terms of a collective bargaining agreement between Safeway Stores and the United Food and Commercial Workers, AFL-CIO.

The collective bargaining agreement under which Livadas was employed contained two general employee classifications (Food and Non-Food or General Merchandise) and provided for eleven separate subclassifications in each of the general classifications. The union contract contained bonus pay, shift differential, termination pay[7] and overtime compensation[8] provisions.

In addition to the above, the facts reflect that the collective bargaining agreement also contained other provisions which would necessarily require interpretation in order to reach the conclusion that the wages were, in fact, "due" or

[7]The CBA provided at §3.2 that if an employee is not given specified notice of termination, the employee must be given the equivalent pay. This pay in lieu of notice provision does not operate, however, if the discharge is for "cause".

[8]The CBA contained premium pay provisions which differ substantially from the provisions of the California minimum requirements. The premium pay provisions do not appear to rely simply upon the number of hours an employee works but upon such factors as the day of the week the work is performed or whether the work was performed during a scheduled meal period.

whether the failure to pay the wages was "willful"[9]. Livadas alleged that the largest portion of the sum due to her at time of termination represented vacation wages. The CBA provides at §11.5 that the parties were bound by the terms of the Northern California Retail Clerks Union-Employers Vacation Fund and Plan. It is unclear whether these vacation wages were subject to the arbitration provisions of the collective bargaining agreement. However, the California Labor Commissioner would have no jurisdiction over this "plan" if it were determined, as appears likely, to be subject to ERISA. (See 29 U.S.C. 1144(a)) Additionally, the provisions of California Labor Code §227.3 would require that the inquiry regarding the vacation wages be based entirely on the terms of the collective bargaining agreement, not state law.[10]

In the opinion of the state officials, a fair reading of the provisions of Labor Code §203 which require a finding that failure to pay wages <u>due</u> at termination be <u>willful</u>, made it necessary to address (i.e., interpret and/or apply) each of the

[9]The definition of the term "willful" as it is used in Labor Code § 203, is found at Title 8, California Code of Regulations ("C.C.R."), §13520:

> "A willful failure to pay wages within the meaning of Labor Code Section 203 occurs when an employer intentionally fails to pay wages to an employee when those wages are due. However, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203.
>
> "a) Good Faith Dispute. A 'good faith dispute' that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist. Defenses presented which, under all the circumstances, are unsupported by any evidence, are unreasonable, or are presented in bad faith, will preclude a finding of a 'good faith dispute'."

[10]Labor Code §227.3, generally, requires the Labor Commissioner to apply unique vesting rules and disregard any forfeiture provisions in an employer's vacation pay policy. (See *Suastez v. Plastic Dress-Up* (1982) 31 Cal.3d 774; 647 P.2d 122; 183 Cal.Rptr. 846) However, the provisions of Labor Code §227.3 do not apply if the vacation pay policy is contained in a collective bargaining agreement.

above-described provisions of the collective bargaining agreement in determining the validity of Livadas' claim for relief.

II.
REASONS FOR DENYING THE WRIT OF CERTIORARI

A. *The Ninth Circuit's Decision Reflects Current Law*

The Ninth Circuit's decision in this case parallels the decisions of this court which have "mandated resort to federal rules of law in order to ensure uniform interpretation of collective-bargaining agreements, and thus to promote the peaceable, consistent resolution of labor-management disputes." *Lingle v. Norge, supra,* 486 U.S. at 404.

The complaint by Livadas, as described by the Ninth Circuit decision, alleged that the Labor Commissioner's policy "not to adjudicate any dispute concerning the interpretation or application of any collective bargaining agreement containing an arbitration clause" is preempted by federal labor law[11]. As the Ninth Circuit noted, Livadas contended that the California Labor Code sections which were applicable "provide independent state rights and do not concern the interpretation or application of collective bargaining agreements."[12]

On the other hand, the Labor Commissioner, in reviewing the facts to establish his jurisdiction under the state law, determined that "Labor Code Section 203 requires that the wages continue at the 'same rate' until paid. In order to establish what the 'same rate' was, it is necessary to look to the collective bargaining agreement and 'apply' that agree-

[11]*Livadas v. Aubry*, 943 F.2d 1140, 1144 (9th Cir.1991)

[12]*Id.*, at 1144

ment."[13] The Labor Commissioner, in dismissing the complaint for lack of jurisdiction, also stated that "[T]he [California] courts have pointed out that such an application is exactly what the provisions of Labor Code Section 229 prohibit."[14] The decision by the Labor Commissioner to dismiss the claim was based upon the Commissioner's application of state law as that law had been interpreted by the California courts.

The Ninth Circuit decision explained that California Labor Code §229 was a "perfectly valid state statute" which the California courts have interpreted as "prohibit[ing] the Labor Commissioner from assuming jurisdiction to enforce claims for wages arising under collective bargaining agreements." This result, the Ninth Circuit concluded, is not only permissible under federal law but is "required under federal law." Any California law which permitted one of its agencies or its courts to adjudicate disputes arising under collective bargaining agreements containing arbitration clauses would be preempted. Labor Code §229 simply codifies the requirement that the California Labor Commissioner may not assume jurisdiction which would require the application or interpretation of the terms of a collective bargaining agreement—a codification which "recognize[s] the importance of both collective bargaining agreements and arbitration"[15].

[13]*Id.*, at 1144.

[14]The Labor Commissioner relied not only upon the case of *Plumbing, Heating, etc. v. Howard, supra,* 53 Cal.App. 3d 828, but upon two subsequent, unreported California Superior Court Appellate Department cases involving the Labor Commissioner which held, specifically, that where the employment was covered by a CBA, waiting time penalties pursuant to Labor Code §203 could not be ascertained without interpreting or applying the terms of the collective bargaining agreement.

[15]*Plumbing, Heating, etc. v. Howard, supra,* 53 Cal.App.3d 828, 834-35.

As the Majority opinion below points out, Livadas does not contest the fact that the State Labor Commissioner does not have the jurisdiction to interpret or apply the terms of the collective bargaining agreement. Instead, Livadas contends that the Labor Commissioner misinterpreted the California state law in reaching the conclusion that the provisions of Labor Code section 201 and, in particular, section 203, require the trier of fact to interpret and apply the terms of the collective bargaining agreement in order to adjudicate her claim.

Since Livadas' contention, as the Ninth Circuit concluded, was that the Labor Commissioner misinterpreted state law, not federal law, her remedy was to seek a writ of mandate in the California courts to correct the supposed error.

The Ninth Circuit directed Livadas to the case of *Baker v. Aubry*, (1989) 216 Cal.App.3d 1259, *review denied*, Mar. 15, 1990, *cert. denied*, ___ U.S. ____, 111 S.Ct. 66, 112 L.Ed.2d 40 (1990) and suggested that her application for a writ should allege that the Labor Commissioner misinterpreted the requirement of California State Labor Code § 229. In her Petition for Writ of Certiorari, Livadas refers to the suggestion by the Ninth Circuit that her remedy is an application for a writ of mandate in the state courts as an extension of the abstention doctrine. In fact, what the Ninth Circuit suggests is not an extension of the doctrine of abstention, but a classic application of that doctrine.

In response to the suggestion that the proper remedy for the alleged error she attributes to the state Labor Commissioner is a writ of mandate in the state court, Livadas, in the Petition for Writ of Certiorari filed with this Honorable Court, denies that such a remedy is available, relying on the case of *Painting & Drywall Work Preservation Fund v. Aubry* (1988) 206 Cal.App.3d 682, to support that erroneous

position. The *Painting & Drywall* case, of course, has nothing to do with the exercise of jurisdiction. The case involves the right of the Commissioner, in investigating complaints filed with the Division's Field Enforcement Unit (See Labor Code § 90.5(a)), to exercise its discretion to "ensure the available resources will be concentrated in industries, occupations, and areas in which employees are relatively low paid and unskilled, and those in which there has been a history of violations."

On the other hand, the case of *Baker v. Aubry, supra*, which the Ninth Circuit relied upon, is directly on point. There the Labor Commissioner, faced with a challenge to his jurisdiction based on the fact that the complainant Baker's employment was subject to Rule 347 of the New York Stock Exchange, dismissed the complaint based on this Honorable Court's decision in *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1986). The basis for the dismissal was, of course, the unique nature of Baker's employment which was subject to the rules of the New York Stock Exchange and the existence of the arbitration agreement required by that employment. Such employment had been determined to be subject to the Federal Arbitration Act.

Nancy Jane Baker, the complainant in *Baker v. Aubry*, upon the dismissal of her complaint by the Labor Commissioner, sought a writ of mandate in the state Superior Court which was denied. Baker appealed that denial to the Court of Appeal, First District. After again being denied the right to have her claim heard before the Labor Commissioner, Baker subsequently sought certiorari which this Court denied. The Labor Commissioner in the *Baker v. Aubry* case exercised exactly the same analysis in reaching the decision to dismiss as that exercised in the instant case. The only differences were that in *Baker v. Aubry* the statutory arbitration requirement arose under federal law (the Federal Arbitration Act) and the

question of jurisdiction was not raised until the hearing before the Labor Commissioner. In the instant case, the agency dismissed *sua sponte* based on the facts presented by the complainant, Karen Livadas.

B. *Petitioner's Illogical Alternative Would Require Review Of The State Labor Commissioner's Decisions Regarding Jurisdiction Be Conducted By The Federal District Court*

Though left unsaid by Petitioner, there is only one logical alternative to the Ninth Circuit's decision. The current Labor Commissioner policy recognizes the state agency's right, in the first instance, to establish its jurisdiction by determining whether any complaint requires the application and/or interpretation of the terms of a collective bargaining agreement pursuant to state law (Labor Code §229). That agency decision is subject to review by writ of mandate in the state courts. The only alternative is to make that determination subject to review, on a case-by-case basis, in the federal courts.

In this particular case, the federal District Court decision, reversed by the Ninth Circuit, found that the actions of the Labor Commissioner in interpreting the provisions of Labor Code §229 involved a federal question. The District Court enjoined the Labor Commissioner to "enforce sections 201 and 203 of the California Labor Code without discrimination based upon a given claimant's coverage under a collective-bargaining agreement having an arbitration clause." The order of the District Court is premised on the finding by the District judge that "[T]he simple question of whether the [state] statute was violated can be determined wholly independently from the CBA"[16]. This decision by the District Court constituted a review of the Labor Commissioner's determination of the case based upon the Labor Commissioner's application of the state law[17].

The result of the District court's ruling, of course, is to force the California Labor Commissioner to accept all complaints filed by employees in the State of California alleging disputes concerning those Labor Code sections. The Labor Commissioner would no longer enjoy the discretion of determining his or her own jurisdiction in this area based upon the Commissioner's interpretation of state law. The parties could no longer expect the Labor Commissioner to base his or her jurisdiction on an interpretation of state law (Labor Code §229) where the employer raises the defense that a "good faith dispute" regarding whether the wages were due under the employment contract existed. However, inasmuch as the question of the jurisdiction of the Labor Commissioner would, according to the federal District Court, continue to be subject to the federal law, either party could look to that court to review the actions of the Labor Commissioner in regard to jurisdiction.

Thus, employers who felt that the Commissioner's acceptance of jurisdiction in a particular case deserved further review could look to the federal District Court to perform that service.

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[16]Neither the District Court nor the dissent in the Ninth Circuit case furnish any bright line test which the Labor Commissioner might utilize to determine its jurisdiction in this situation. In fact, aside from generalities which clearly do not address the question of the "willfulness" of the employer's actions, the District Court and the dissent offer no guidance in this area.

[17]So sure was the District Court judge of the facts and law in the case, the Labor Commissioner was "ordered to pay as compensatory damages to the plaintiff, Karen Livadas, the full value of her wage claim in the event that the claim is held time-barred by the California State Courts."

C. *The Cases Cited By Petitioner Are Easily Distinguished*

Appellee cites several cases in an attempt to establish a conflict between results in other federal Circuit courts and the majority opinion rendered in the instant case. However, unlike the instant case, which hinges upon the application of a state statute consistent in all respects with federal law, which precludes state officials from determining state claims requiring the application or interpretation of a collective bargaining agreement, the cases cited by appellee deal with state laws inconsistent with federal policy. However, none of the cited cases, as discussed, *infra*, are inconsistent with the majority opinion.

1. *Rum Creek Coal Sales v. Caperton*

In the case of *Rum Creek Coal Sales v. Caperton*, 926 F.2d 353 (4th Cir. 1991), the court was asked to review the West Virginia Trespass statute (W.Va. Code §61-3B-3) which provides that while persons entering property without permission is a criminal offense, the provisions of this law do not apply in a labor dispute. The Fourth Circuit noted that "[t]he ability to withstand a strike or to strike requires that the parties may resort to those laws not preempted by the NLRA. Part of the laws of West Virginia include laws against criminal trespass." Removing the protection of this law from the employer's reach is as much an obstruction of federal policy as if the state were to declare picketing illegal. *Rum Creek Coal Sales, supra,* at 365-366. The Fourth Circuit Court went on to point out that other states (including California) had adopted statutes which precluded imposition of criminal sanctions for trespass where the parties were engaging in "lawful labor union activities or activities subject to the regulation of the NLRA." *Id.*, at 356.

The Ninth Circuit's opinion in the instant case does not purport to deny access to the law to Livadas or any other

individuals who are members of a union or, even, to deny the right to access to all those under the terms of a collective bargaining agreement containing an arbitration clause. The opinion here simply states that the question of whether the claim requires the trier of fact to interpret or apply the provisions of a collective bargaining agreement is a question of state law which should be left to the state agency and, ultimately, the state courts. The question as to the need to apply or interpret the CBA in a particular case is indispensable to a determination of jurisdiction of the Labor Commissioner under state law. Review of that discretionary determination should be directed to the state courts.

The *Rum Creek Coal Sales* case clearly illustrates the differences between the facts in *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) and the situation at issue here. In *Machinists* the Wisconsin Employment Relations Commission found the actions of the union violative of the Wisconsin statute which prohibited sit-in strikes. This Court held that neither the National Labor Relations Board nor the state could prevent the use of sit-ins as a tactical weapon because Congress intended that such activity fell within the purview of a legitimate "economic weapon" which is "part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *Machinists* 427 U.S. at 141. In the instant case, however, the application of the state law (Labor Code §229) does not preclude activity which is even arguably "neither protected nor prohibited" by the Act—the condition imposed by the state law in this case "is perfectly permissible under federal law. In fact, it is required under federal law, for if adjudicating the dispute would require interpreting a collective bargaining agreement, federal law would preempt the adjudication." *Livadas v. Aubry, supra*, 943 F.2d at 1146.

2. *Steelworkers v. Johnson*

In *Steelworkers v. Johnson*, 830 F.2d 924 (8th Cir.1987), the Steelworkers Union questioned the South Dakota Department of Labor's refusal to pay unemployment insurance benefits to certain unemployed workers because "the claimants do belong to Local 7044" while determining other "claimants" to be eligible because they were non-union in the right-to-work law State of South Dakota. The majority opinion in the Eighth Circuit case (heard *en banc*) held that, under the facts in that case, the state's reliance on the union membership of the applicant as a criteria for paying benefits was prohibited by section 7 of the NLRA. The decision of the State of South Dakota did not require any consideration of the terms and conditions of a CBA. The facts in the *Steelworkers* case, illustrate a direct interference with the right of the workers to be represented by a union. The State referee had focused his decision regarding eligibility for the benefits on the employee's union membership without distinguishing those union members who were willing to work despite the strike from those union employees who were unwilling to work because of the strike. *Steelworkers*, at 926. The Eighth Circuit encountered no trouble in finding the use of the criteria required by the state law to be discriminatory.

Again, it would appear, Livadas' reliance on this case evidences her failure to recognize that the Ninth Circuit decision in this case relies on the fact that she herself admits that the correct application of the Labor Commissioner's policy would be not only proper under federal law; but, in fact, required by federal law. The Labor Commissioner's policy does not, as Petitioner (and the dissent) alleges, hinge on membership in a union. The policy required the Commissioner to determine whether the claim by Livadas required, under state law guidelines, a discretionary determination involving the interpretation and application of the CBA. Re-

view of that decision is, according to the majority, properly left to the state courts.

3. *Beckwith v. United Parcel Service*

Reliance on the case of *Beckwith v. United Parcel Service*, 889 F.2d 344 (1st Cir.1989), illustrates Petitioner's misunderstanding of the Ninth Circuit decision. The First Circuit case did not address the exercise of discretion by the state agency. The facts in *Beckwith* require no interpretation or application of the collective bargaining agreement. The First Circuit simply held that the Maine statute which prohibits the execution of agreements providing for payroll deductions as a condition of employment is not preempted by the NLRB.

United Parcel argued that the state law which prohibited the type of payroll deduction was preempted when such deduction was specifically permitted by the terms of the collective bargaining agreement. The Court in *Beckwith*, in view of the recent decisions of this Court in *Fort Halifax Packing Co. v. Coyne* 482 U.S. 1 (1987) and *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), found that argument totally unpersuasive.

The argument propounded by United Parcel, if carried to its logical conclusion, would allow the parties to collectively bargain away the state minimum substantive labor standards such as state-mandated minimum wage available to all workers whether employed under the terms of a collective bargaining agreement or not.

However, unlike the issue in this case, in order to establish the fact that Beckwith's pay was subject to payroll deduction, there was no need to review the terms of the collective bargaining agreement. It was only necessary to review either the employer's or the workers' payroll records. Unlike the facts in this case which require the trier of fact to find both

that the wages are due and the failure to pay the wages was willful, the trier of fact in the *Beckwith*-type case need not determine the wage paid but simply determine if the employee's payroll receipt evidenced an illegal deduction from the gross wages paid.

III.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals does not conflict with cases of either this Honorable Court or with those of any of the other circuits. The Circuit Court's decision is in concert with this Court's decisions which encourage parties to collective bargaining to utilize arbitration to resolve their differences. As the Ninth Circuit concluded, the State of California's adoption of Labor Code §229 is simply a codification of this Court's announced policy which holds that any state-law claim which depends on the interpretation or application of a collective bargaining agreement is pre-empted.

Since there exists no rationale for the granting of certiorari, the Court should deny the Petition.

Respectfully submitted,

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